IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

SECOND APPEAL NO.860 OF 2005

Shri Nilkanthrao Shankarrao Shinde & ors. Appellants

vs.

Shri Narsing Appaso Shinde Respondent

Mr.P.B.Shah for the appellants.

Mr.Ajit Kenjale for the respondent.

CORAM : ANOOP V. MOHTA,J.

DATED : 17th July, 2007

P.C.

This second appeal filed by the appellants-original defendants have challenged the decree and order dated 31.8.2004 passed by the Additional District Judge, Satara and thereby confirmed the decree and order of Civil Judge, Junior Division, Koregaon. In the result, the respondent-original plaintiff herein has proved his title to the suit property and exclusive possession.

2. As the plaintiff failed to prove his exclusive possession over the suit property and even the obstruction both the courts refused to grant injunction as prayed.

3. The basic suit was for declaration of ownership with a consequential relief for perpetual injunction. The

defendants did not enter into the witness box to deny the claim of the plaintiff. The property in question being ancestral property and as there was no partition between them, the plaintiffs and defendants have been in possession of the suit property. The subject matter of the suit is undivided 1/8th share of Hirabai who bequeathed the property to plaintiff by Will dated 9.10.1981. In a way the defendants have not denied the title of the plaintiff over the suit property. The property, therefore, has been in possession of both the parties and as observed, the plaintiff-respondent failed to prove his exclusive possession over the property. Therefore, both the courts refused to grant any relief of perpetual injunction. The learned counsel appearing for the appellant has basically relied upon the proviso to Section 34 of Specific Relief Act and contended that in view of the Apex Court decision in **Vinay Krishna v. Keshav Chandra & anr., 1993 Supp (3) SCC 129**, based on Section 42 proviso of Specific Relief Act, 1877, that such a suit for declaration of title without claiming for possession was not maintainable. The facts are totally distinct and distinguishable. In the present case, apart from the declaration there is a relief also claimed for perpetual injunction. There is material on record to show that dispute is about ancestral property both the parties have been in possession of the property. The Court in fact held that the plaintiff

failed to prove his exclusive possession. Such suit therefore is maintainable. The plaintiff-respondent was not claiming an exclusive possession of the property.

4. He has further relied on **Jagdishsingh Deonandansingh v. Feku Jamnaprasad Yadav & ors., 1997 (1) Bom.C.R.457**. That was a case where the suit was for declaration of ownership of the property which was admittedly not in possession of the plaintiff. Therefore it was held that such suit without prayer for possession is not maintainable. The facts are, as noted, in the present case, are different.

5. The learned counsel for the respondent has, however, strongly relied on **C. Mohammad Yunus v. Syed Unnissa & ors., AIR 1961 SC 808,** whereby the Apex Court, based on Section 42 of old Specific Relief Act held that a suit for declaration as a consequential relief for injunction is not a suit for declaration simpliciter. Such a suit is maintainable as further relief can be by way of injunction. In the present case, the plaintiff has sought for declaration and claimed relief for perpetual injunction. Such suit therefore cannot be said to be not maintainable as contended by the learned counsel for the plaintiff.

6. The Bombay High Court in **Nagorao Narayan Diwane vs.**

Narayan A. Dighe, 2000 (2) Mh.L.J. 272, based on Section 34 of the Specific Relief Act, 1963, after considering the various other judgements on the issue has observed in paragraph 21 as under:

"21. A reference has also been made to the decision reported in AIR 1972 SC 2635. In this case the same principle is laid down and it is found that when defendant is in possession of the suit properties and the plaintiff in his suit does not seek possession of the properties, but merely claims a declaration that he is owner of the suit property, the suit is not maintainable. The suit is hit by section 42 of the Specific Relief Act, 1877. Mere claim for declaration of title over the property without seeking the relief of possession is not maintainable. In the case before hand the factual position is entirely different. It is true that the plaintiff had claimed simpliciter declaration of his title over the suit property. He did not seek a consequential relief of possession, but it is because plaintiff asserted and claimed that he was in possession of the said property, both the Courts below have found as a finding of fact that the suit property was in possession of plaintiff. Therefore, plaintiff's suit was maintainable merely for the relief of declaration simpliciter. In other words it is not barred by section 114 of Specific Relief Act as contended by the learned

counsel for the appellant."

7. The facts of the above case in Nagorao (supra) is quite similar to the present matter. The plaintiff has, apart from the declaration of his title over the suit property has also sought a consequential relief for injunction, based upon joint possession of the property.

The suit, therefore, as filed is maintainable.

8. Considering the concurrent finding as arrived at by both the courts below and as there is no perversity and as the reasonings are within the frame work of law and the record and as there is no substantial question of law involved, the second appeal is dismissed.

[ANOOP V. MOHTA,J.]